No. 92-1568

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNIFIED SCHOOL DISTRICT NO. 501,
SHAWNEE COUNTY, KANSAS

Petitioner,

vs.

CHARLES SMITH & KIMBERLY SMITH,
MINOR CHILDREN, BY THEIR
MOTHER AND NEXT FRIEND,
LINDA BROWN SMITH, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS

A. The respondents, like the Tenth Circuit, attempt to obscure the district court's thorough consideration of the long history of desegregation in Topeka by relying upon distortions of a few isolated statements of the trial court and then contending that the Court of Appeals' decision is based upon an affirmance of these facts.[1] A proper review shows that the Court of Appeals reversed, rather than affirmed, the trial court with respect to nine facts enumerated by respondents on pages two and three and pages five and six of their response. Although respondents did not contend the trial court's findings of fact were clearly erroneous, the Court of Appeals did base its reversal upon *de novo* review of the record.

1. As to school boundaries, the district court held that "[a] review of the school boundaries as they have developed over thirty years does not reveal a segregative pattern that remains today." App. 29a. As to boundaries drawn around the former *de jure* black elementary schools in the mid 1950's, the district court held that the "schools have long been closed and the segregative effects of those boundaries have attenuated entirely." *Id.* The Court of Appeals reversed. App. 75b-77b.

2. The district court found that the minority percentage of students at Lowman Hill has been within

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[1] Eight factual findings which the majority identified as being made by the trial court are examined by the dissent (App. 73c-81c), which concludes, "Regrettably this court does not give a fair recitation of the district court findings". App. 73c. The same could be said of the respondents.

fifteen percent (15%) of the district average within recent years, and therefore the school is not racially identifiable. App. 30a. The Court of Appeals nevertheless found Lowman Hill to be "the most serious example of segregative attendance boundaries." App. 76b. The district court rejected plaintiffs' contention that Quinton Heights was a "black school" bordering on a "white school". App. 52a. The so-called "white school" (Stout Elementary) possesses a minority enrollment "very close to the district average." *Id.* The Court of Appeals found Quinton Heights' boundaries to be the "result of continued manipulation by the school district" (App. 85b), thereby reversing the district court's finding that "attendance zones are not segregatively gerrymandered." App. 32a.[2]

3. All *de jure* black schools had been closed by 1978, with three of the four having been closed by 1962. App. 9a, 25a. The dissent thoroughly examines the errors of the respondents' analysis of attendance statistics for Highland Park North Elementary (App. 143c-145c), Lafayette (App. 145c-150c), and Quinton Heights. App. 151c-161c. The district court found that "[t]he school closings over thirty years in the district indicate a policy of desegregation." App. 25a. The Court of Appeals reversed. App. 80b-81b.

4. As to school openings, the district court concluded, "In sum, it does not appear that the district's school construction policy has promoted segregated residential patterns or segregated schools."

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[2] The dissent fully examines the majority's errors regarding Quinton Heights (App. 151c-161c) and Lowman Hill. App. 161c-167c.

App. 28a.[3] The Court of Appeals reversed. App. 79b.

5. All optional attendance zones were eliminated in 1976. App. 23a. The district court found that "any segregative effect of the zones was slight and *does not remain today*." *Id.* (emphasis added). The Court of Appeals reversed. App. 61b.

6. According to respondents' own expert, space additions were used at predominantly white, predominantly non-white, and racially balanced schools. App. 24a. The district court found that there was no showing that space additions caused current racial imbalances. App. 24a-25a. The Court of Appeals reversed. App. 61b.

7. With respect to alternative decisions, the district court found that the 1984 plans, which would have eliminated all majority minority schools, were not adopted because of uniform and vigorous negative public reaction. App. 52a-53a. Further, it stated that although "[a]t any time, more could have been done to achieve racial balance,...it begs the issue of this case to argue that racial balancing must be done today because it was not done yesterday." App. 54a. Even the Court of Appeals refused to adopt respondents' position that the failure to adopt the reorganization plans evidence absence of commitment to desegregation. App. 67b n.75.

8. The district court rejected the allegation of a correlation between faculty and staff assignment and high minority student populations (App. 40a-43a), finding that the "district's approach to faculty and staff is not indicative of a dual system of education." App.

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[3] See dissent at App. 171c-175c.

43a. The Court of Appeals reversed, finding such correlation "clear". App. 54b.

9. As to student assignment in the Topeka schools at the time of trial, the district court concluded that the school district has "proven by a preponderance of the evidence that [it] is a unitary school system". App. 14a. "Although racial balance has not been achieved, students are not separated by race. Thus, a vestige of segregation has been eliminated." App. 20a. The Court of Appeals reversed, holding that statistics regarding the percentage of minorities "speak for themselves" and "add up to a current condition of segregation" in the Topeka school system. App. 49b. As to faculty and staff assignments, the district court found that "all of the schools have been within the $\pm$10% range in the last ten (10) years" (App. 43a) and that such assignments do not "serve to identify schools as intended for white or black students." *Id.* The Court of Appeals reversed, substituting its evaluation of the data for that of the trial court. App. 50b, 54b, 72b-74b.

The Court of Appeals did not "largely [affirm] the primary factual findings of the district court." Res. Brief at 5. The reversed factual findings, discussed above, regarding current segregation as to students and faculty and staff assignments were the essential findings which shifted to the defendant district the burden of proof to show that imbalances were not causally related to the prior *de jure* system. In addition, the Court of Appeals rejected the district court's view of the evidence in favor of that of the respondents' experts (See App. 1c-2c), ignored the highly relevant changes in the district made by full implementation of the HEW approved desegregation plans (App. 63b-64b), rejected

as irrelevant the segregation caused by demographic forces beyond the control of the district (App. 65b-66b, 81b), and required a showing that maximum practicable desegregation had been achieved as the only relevant evidence to show an absence of causal connection between current imbalances and the prior *de jure* system. App. 30b.

B. Respondents identify two supposedly erroneous legal rulings of the trial court which allegedly explain the divergent results of the trial and appellate courts. The respondents claim that the district court imposed upon plaintiff the burden of "showing that actions taken by the school board between 1951 and the time of trial were intentionally segregative." Res. Brief 3. The respondents mischaracterize the district court's analysis. Intent was considered relevant to the unitariness issue, but not controlling. "The intent inquiry is inclusive of whether a school board has acted affirmatively, not merely neutrally, to eliminate a dual system existing in 1954." App. 13c. The Tenth Circuit views affirmative desegregation of controlling importance. The trial court did not impose the burden on plaintiffs to show the presence of segregative intent. It decided the case by holding that "*defendants* have proven by a preponderance of the evidence that U.S.D. #501 is a unitary school system" [App. 14a (emphasis added)]--"a system in which the characteristics of the 1954 dual system either do not exist or, if they exist are not the result of past or present intentional segregative conduct of defendants or their predecessors." App. 8a. If there is concern that the trial court did not follow precedent regarding the burden of proof, remand for reconsideration, not remand for remedy, is the appropriate outcome.

The respondents also mischaracterize the ruling below when stating that the "district court ruled that Topeka's failure to desegregate was excused because, in the early 1950's, the school district adopted a neighborhood schools system." Res. Brief 4. The trial court did not excuse a failure to desegregate. It held that the schools are integrated and "free of the characteristics of *de jure* segregation." App. 57a. "[S]ubstantial integration" resulted from the adoption of the race neutral neighborhood school attendance system in the 1950's. App. 53a. After decisions of this Court "encouraged race-conscious efforts to eliminate vestiges of segregation and HEW challenged the progress of desegregation... additional action was then taken to improve racial balance." App. 53a-54a. The trial court "looked beyond the neighborhood school plan for segregative effect, thoroughly analyzing quantitative measures of racial composition." App. 72c.

C. The Court of Appeals did impose the burden upon the school district to achieve the "greatest possible degree of racial balance reasonably practical" (Petition 13-14), while giving only lip service to the essential role of causation. Petition 17-19. Even after this Court's decision in *Freeman v. Pitts*, 403 U.S. ___, 112 S.Ct. 1430 (1992), the Court of Appeals continued to reject the district court's correct approach as to the causal effect of demographic forces. App. 7e n.6, 10e. As noted by the dissent, this rejection of the demographic element was based upon the majority's "overinclusive definition of racial identifiability...and [imposition of] liability in the absence of racial balance, regardless of the showing made by the school district..." App. 9f.

II. REASONS FOR GRANTING THE WRIT

The respondents correctly concede that *Freeman* holds that there is "no duty to correct all racial imbalances without regard to cause." Res. Brief 11-12. Respondents are disingenuous, however, when arguing that the Court of Appeals adhered to this rule. Without doubt, the Court of Appeals does direct the district to cure all racial imbalances in Topeka schools, even though these imbalances were found by the district court not to have been caused by school board action or inaction.

This error is vividly evidenced by contrasting the trial court's and the Court of Appeals' discussions of the individual schools which are alleged to be racially identifiable vestige minority schools. For example, the district court found that the "increase of minority students at Belvoir was not caused by the school district." App. 33a. It noted that, when annexed in 1960, the school had an average or slightly above average minority population; that the minority population increased in the 1960's, after the construction of federally subsidized housing projects in close proximity to the school; and that minority population decreased through the 1981 closing of Rice School and the reassignment of students.[4] *Id.* The majority, however, imposed a duty upon the district to desegregate Belvoir without regard to the cause of its high minority population. App. 81b-82b.

The analysis with respect to Hudson is similar. Hudson was primarily white when built in annexed territory in 1963. *Id.* The minority student population

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[4] Further detail is found in the dissent. App. 136c-139c.

increased rapidly in the late 1960's and early 1970's with the construction of subsidized housing projects. App. 33a. A majority of the Court of Appeals identified Hudson as a high-minority school. App. 82b-83b. The dissent notes that "Hudson is perhaps the archetype for illustrating the court's refusal to consider the effect of demographic factors which result in changing student racial composition as various schools." App. 140c.

The contrasting findings regarding Lafayette further illustrate the point. Lafayette was an all-white school prior to the end of *de jure* segregation. App. 35a. Federally subsidized housing projects were built in the area in the early 1960's. App. 147c. Yet Lafayette is identified by the majority as a vestige minority school. App. 84b. The Tenth Circuit majority holds the defendant school district responsible for changes in student attendance which resulted from demographic forces independent of the schools.

The majority characterizes the defendants' experts, the district court, and the dissent as mistaken in their belief that "the changing demographics which resulted in unfavorable racial balances at various schools excuses the school board from achieving more acceptable racial balances." App. 65b. It states, "This view is clearly wrong where, as here, the school system is under an affirmative duty to dismantle a dual school system." *Id.* "The school district's excuse for the racial imbalance which exists today in Topeka's schools is that shifting residential patterns caused the problem. This is an unacceptable excuse when the school district has never fully dismantled the effects of the prior *de jure* segregation." App. 66b. The majority does not reject the dissent's analysis that "the increasing

minority percentages for these schools resulted from demographics, not from school board action." App. 81b. Rather, it holds that "a school district is not absolved by demographics from its affirmative duty to desegregate before it achieves unitariness." *Id.*

The Court of Appeals did not amend these findings when reconsidering the case following remand and direction to apply the rule of *Freeman*. Rather, the court continued to reject the district "court's conclusion that demographics caused segregation" (App. 8e n.6) and adhered to its position that the defendant district has the duty to correct racial imbalances caused by demographic forces occurring before achieving unitary status. *Id.*; see also App. 10e. In the view of the Tenth Circuit, racial imbalances caused by demographic forces outside the control of the district must be remedied unless racial balance has previously been achieved.[5]

Respondents fail to address issues other than causation. Respondents do not attempt to justify the outcome of requiring remedy of student assignment in Topeka, but not DeKalb County. Respondents do not attempt to justify the Tenth Circuit's view of the affirmative duty to achieve racial balance or the court's expanded scope of review. Respondents, like the Tenth Circuit, ignore the integrative actions of the district,

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[5] In addition, throughout the entire appellate history of this case, the courts and respondents have totally ignored the fact that there was not a finding of *de jure* segregation in the junior and senior high schools in 1954. The junior high schools had been desegregated in 1941, and in 1951 there was only one high school which was attended by all students without regard to race. App. 2a, 8a-9a. The imbalances in student population at the junior and senior highs in Topeka today are not vestiges. Clearly, the Tenth Circuit is imposing a duty upon the defendant district to achieve racial balance without regard to causation.

particularly the full implementation of HEW approved desegregation plans. As a result of those integrative plans, the school district closed five of nine junior high schools, transferred the ninth grade to the senior high schools, established six middle schools by the conversion of four junior high schools and the construction of two additional middle schools, closed six elementary schools, eliminated all remaining optional attendance zones, and reassigned nearly 200 faculty members. App. 14b, 50c-51c.

III. CONCLUSION

Petitioners pray that this Court accept review or, in the alternative, summarily reverse the Tenth Circuit and remand this case to the trial court for reconsideration in light of current conditions and this Court's decisions in *Freeman v. Pitts*, 112 S.Ct. at 1430 and *Board of Educ. v. Dowell*, 498 U.S. 237, 111 S.Ct. 630 (1991).

Respectfully submitted,

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